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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

WICHITA TELEVISION CORPORATION, INCORPORATED,
d/b/a KARD-TV, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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A writ of certiorari is respectfully sought, to review the enforcement order which the Court of Appeals has entered against petitioner.

OPINIONS BELOW

The trial examiner's intermediate report is unreported and is printed at R 8-66.[1] The Labor Board

[1] "R" refers to the record as printed for the use of the Court of Appeals; in addition to the certified copy, petitioner has filed nine copies thereof with the Clerk of this Court. "Tr" refers to the official stenographic transcript of the Labor Board hearing as certified to the Court of Appeals.

decision and order, as corrected and amended by the Board, is reported at 122 N.L.R.B. No. 37 and is printed at R 70-83. The Court of Appeals opinion (printed at pages 1a-10a, *infra*) is reported at 277 F.2d 579.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and § 2101.

The Court of Appeals rendered its decision, holding that the Labor Board order should be enforced, on April 5, 1960. On April 25, 1960, petitioner filed petition for rehearing, application for rehearing *en banc*, and petition to reopen the record and to adduce additional evidence. On June 1, 1960, the Court of Appeals denied petition for rehearing and denied petition for rehearing *en banc*. On June 3, 1960, the Court of Appeals entered an enforcement decree.[2] (For the Court of Appeals decision, orders and decree, see Appendix A, *infra*).

QUESTIONS PRESENTED

1. Whether the Court of Appeals is without power to constitute itself so as to include a retired circuit judge, together with the active circuit judges, as a participant in the Court's determination whether a rehearing *en banc* should be granted; and whether, because of the retired circuit judge's participation in the Court as so constituted for such determination, the order denying rehearing *en banc* should be vacated.

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[2] The Court of Appeals has stayed the effective date of its enforcement decree until August 15, 1960, and if within that time a petition for certiorari is filed, then until final disposition by this Court.

2. Whether, in a case involving admittedly serious misconduct which would bar reinstatement rights of any striking employees who committed or participated in such acts, the Labor Board denied petitioner a fair hearing when the Board entirely prevented petitioner from asking competent witnesses (the striking employees themselves) questions to establish if striking employees had actually committed or participated in the admittedly serious acts of misconduct.

3. Whether the Labor Board violated Section 8(b) of the Administrative Procedure Act, 5 U.S.C. § 1007(b), by the Board's failure to show any ruling on petitioner's exception to the foregoing denial of a fair hearing and by the Board's failure to state any findings and conclusions, reasons or basis, with reference to the foregoing material issue of fair hearing presented by the record.

4. Whether the Court of Appeals should have allowed the record to be reopened before the Labor Board for the taking of additional evidence, particularly when the additional evidence was important to the issues decided by the Board and raised serious questions as to the principal witness whose credibility the Board had accepted; and in any event, whether the Court of Appeals failed to make a proper showing concerning the exercise of its discretion on this issue.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions, being somewhat lengthy, are set forth in Appendix B, *infra*. They consist of the Code provision relating to Court of Appeals rehearing *en banc*, 28 U.S.C. § 46(c); the Due Process Clause of the Fifth Amendment; Section 10(b) of the National Labor

Relations Act as amended, relating to hearings before the Board; Section 7(c) of the Administrative Procedure Act, relating to hearings before administrative agencies; Section 8(b) of the Administrative Procedure Act, relating to administrative agency decisions; and Section 10(e) of the National Labor Relations Act as amended, relating to remand from the Court of Appeals to the Labor Board to adduce additional evidence.

STATEMENT

This is a Labor Board case in which the very rudiments of a fair hearing have been wholly denied to petitioner on a basic issue squarely raised.

Petitioner owns and operates a television station in Wichita, Kansas, and was charged by the complaint (R 511-576) with certain unfair labor practices. After a hearing the trial examiner made sweeping findings against petitioner on the various issues involved. Among other things, the trial examiner found that on May 11, 1956, petitioner had discriminatorily discharged two employees (Coker and Neal) on account of union activity; that a strike which began June 2, 1956, was caused by petitioner's unfair labor practices; that on July 16, 1956, petitioner had refused reinstatement to a group of unfair labor practice strikers who had made an unconditional request for reinstatement; and that Coker and Neal, and also the strikers, should be ordered reinstated with back pay (R 8-66).

Petitioner filed exceptions (R 66-70; see also certified appendix to petitioner's brief in the Court of Appeals). The Board, with some minor modifications, adopted the trial examiner's findings, conclusions and recommendations (R 70-83). Important factual questions turning on credibility were resolved in favor of Coker's

credibility by both the trial examiner (R 36-38) and the Board (R 72, note 3). Coker, Neal, and seventeen strikers were thus all ordered reinstated. The Court of Appeals has directed enforcement of the Board's order (Appendix A, infra).

A basic issue in the proceeding was whether certain acts of serious misconduct had been committed by, or were otherwise attributable to, any of the employees being reinstated. If so, then both the Board and the Court of Appeals acknowledged that the employees guilty of such serious misconduct would be ineligible for reinstatement.

At the hearing petitioner subpoenaed a number of the striking employees as witnesses. Petitioner sought to interrogate these persons as to whether they had in fact committed or participated in the specific acts of serious misconduct, or had knowledge concerning who did. The trial examiner shut off this line of inquiry entirely. Having thus himself prevented petitioner from adducing evidence from the very witnesses likely to have the most direct knowledge of such facts, the trial examiner then ruled that petitioner had failed to connect the acts of serious misconduct with any of the employees being ordered reinstated. Unquestionably petitioner had failed to prove a connection—the trial examiner had absolutely stopped petitioner from asking questions necessary to ascertain whether in fact such connection existed.

In other words, on this whole issue it was the trial examiner who created the vacuum in the record when he expressly prevented petitioner from asking the pertinent questions of the witnesses petitioner had summoned; and then the trial examiner treated peti-

tioner, rather than himself, as the one at fault because such a vacuum existed. On the basis of this radical and extraordinary departure from the principles of a fair hearing, reinstatements have been ordered without ever affording petitioner an opportunity to develop the facts of the case on this basic issue.

In more detail, this denial of a fair hearing occurred in the following manner:

Early in the hearing petitioner made clear its intention to rely, by way of defense to certain claims for reinstatement rights under the Act, on facts which would show that various striking employees had engaged in acts of serious misconduct which would bar their reinstatement from being ordered in this proceeding (Tr 263-264, 456-460). In presenting its case petitioner then offered to prove (R 326-339) that during the period of the strike—namely, June and July 1956—there were committed certain specific serious acts of misconduct, including:

> (a) various specific occurrences of tire-slashings and other physical damage inflicted on automobiles belonging to non-striking employees of petitioner;
>
> (b) shifting of a large, heavy microwave unit from its proper telecasting position;
>
> (c) receipt by a non-striking employee of an anonymous threatening telephone call.

The trial examiner, sustaining the Board's prosecuting attorney, took the position at the hearing that he would admit as evidence only those acts of misconduct for which petitioner established a definite connection be-

tween the particular act of misconduct and one or more of the strikers (R 326, 338-339, 368).[3]

Seeking to furnish proof of such connection, petitioner subpoenaed a number of the striking employees and had eight of them present in the hearing room under subpoena to be called as witnesses.[4] The first was McOsker (R 425). McOsker testified that, except for about three days when he had been away in Kansas City, he was on the picket line every day during the strike (R 426); he was familiar with the picket schedule which was set up and had met with some of the other picketers (R 426-429). When further questioning was challenged by the Board's prosecuting attorney (R 430), petitioner's attorney stated that it was material to petitioner's case to show what activities the striker participated in, and that the commission of prohibited acts would deprive a striker of his right to reinstatement regardless of whether petitioner at the time of the picketing had actual knowledge that the striker had committed the act.[5]

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[3] It was shown at the hearing that there also occurred certain acts of misconduct which were attributable to identified strikers, but the trial examiner and the Board found that the particular acts of misconduct connected up with identified strikers were too trivial to impair reinstatement rights of the strikers (R 53-57; 76-77). What the petition for certiorari is relying on, however, are the acts of misconduct which were admittedly of a serious nature and concerning which the trial examiner prevented petitioner from adducing evidence as to whether the connection with strikers existed.

[4] The eight were McOsker, Cole, Daley, Goulart, Hippen, Menefee, Millar, Parsons (R 425, 443). All eight are among those individuals included in the Board's reinstatement order (R 83).

[5] Petitioner also sought at the hearing to show that petitioner's actions in not taking the strikers back was justified under the doctrine of *Rubin Bros. Footwear, Inc.*, 99 N.L.R.B. 610, order

In the ensuing colloquy the trial examiner indicated an intention to cut petitioner off from finding out what had been discussed at meetings McOsker had attended with other picketers (R 431-435). Petitioner's attorney then specified a list of items concerning which he wanted to interrogate McOsker and the other subpoenaed strikers (R 435-437). This list included, among other things, the tire-slashings and other specific acts of physical damage inflicted on the automobiles of petitioner's non-striking employees; the shifting of petitioner's microwave unit; the threatening telephone call to one of petitioner's non-striking employees. Responding to the trial examiner's inquiry, petitioner's attorney stated petitioner would expect to obtain from the witness McOsker evidence that members of the picketing group had committed the acts listed by directly participating in such acts and had actually aided and abetted the commission of the acts (R 437-438); and that petitioner expected, by interrogating McOsker and the other subpoenaed witness, to obtain information which would get these acts out of the category of acts committed by persons unknown (R 438-440). The trial examiner asked whether both sides agreed that the acts listed were incidents where thus far there had been no evidence that a person who committed the act was an identified striker or a person wearing a picket sign; petitioner's attorney agreed

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vacated, *Rubin Bros. Footwear* v. *National Labor Relations Bd.*, 203 F.2d 486 (5th Cir. 1953), which held that when an employer had established its good faith belief that strikers had engaged in misconduct, it then became incumbent upon the Board's General Counsel to prove that the strikers had not, in fact, engaged in such misconduct. In the present case the Board (R 77) said that it adhered to the rule it had announced in *Rubin Bros.*, "but we think that a good faith belief must be established by more than [petitioner] has shown here."

this was correct "insofar as the record exists at this point" (R 442). The trial examiner then sustained the objection to petitioner's whole line of inquiry, ruling it immaterial (R 442). The trial examiner further stated for the record that his ruling would be the same as to the various other strikers subpoenaed by petitioner (R 443).

Thus the trial examiner completely blocked petitioner's effort to interrogate the striking employees, who were the persons most likely to possess direct knowledge of the facts, as to whether they themselves or any of the other striking employees had committed the acts of serious misconduct. Nevertheless, having effectively prevented petitioner from adducing evidence of any connection between the strikers and the serious acts of misconduct, the trial examiner in his intermediate decision ruled there had been a "failure of proof" because petitioner "had no proof connecting any of these events to either individual strikers, the group of strikers or the Union" (R 57). Petitioner duly excepted to the trial examiner's rulings as depriving petitioner of a fair hearing and denying petitioner due process of law, in that the trial examiner had not allowed petitioner to interrogate the witnesses concerning these serious acts of misconduct (R 68-70).

The Board in its opinion recognized that employees may forfeit reinstatement rights by serious misconduct during a strike, but held that petitioner had not "established a connection between any individual striker or group of strikers and any specific conduct of sufficient gravity to warrant a denial of reinstatement" (R 76-77). The Board said that "the Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed", and that "the Board has considered the Intermediate

Report, the exceptions and briefs, and the entire record in the case" (R 71). Apart from this formal omnibus recital, the Board did not in any way deal with or comment on petitioner's exception to the effect that the trial examiner, by refusing to allow petitioner to interrogate the subpoenaed witnesses in order to establish just such a connection, had deprived petitioner of a fair hearing.

The Board petitioned for enforcement in the Court of Appeals for the Tenth Circuit (R 1-2). Petitioner answered (R 2-6); the case was argued before a panel consisting of Judges Bratton and Pickett and retired Judge Huxman; and the Court of Appeals decided that the Board's order should be enforced (see Appendix A, *infra*).

The Court of Appeals, like the Board, recognized that an employee would be disqualified for reinstatement by proof showing the employee personally participated in acts of serious misconduct.[6] The Court of Appeals also acknowledged there were certain occurrences here which constituted serious misconduct, "such as tire-slashings of automobiles belonging to non-striking employees, and the shifting of a large microwave unit from its proper telecasting position." However, the Court of Appeals held that since "there was no proof that any identified striker, or for that matter any unidentified striker, took part in such acts", none of the individuals had been shown disqualified for reinstatement. (See pages 8a-9a, *infra*.) The Court of Appeals did not in any way comment on peti-

[6] Authorities cited by the Court of Appeals included *International Ladies G.W.U.* v. *N.L.R.B.*, 237 F.2d 545 (D.C. Cir., 1956); *N.L.R.B.* v. *Marshall Car Wheel & F. Co.*, 218 F.2d 409 (5th Cir. 1955); *N.L.R.B.* v. *Crowley's Milk Co.*, 208 F.2d 444 (3rd Cir. 1953); *N.L.R.B.* v. *Wallick*, 198 F.2d 477, 485, note 10 (3rd Cir. 1952).

tioner's contention that the trial examiner and the Board, by preventing petitioner from adducing evidence concerning the connection between the strikers and the serious misconduct, had improperly deprived petitioner of a fair hearing.

The Court of Appeals also rejected petitioner's contention that the Board had violated Section 8(b) of the Administrative Procedure Act, 5 U.S.C. § 1007(b). In so holding, the Court of Appeals decided it was not necessary for the Board to show that it had ruled expressly on each of petitioner's exceptions to the trial examiner's intermediate report; it held that the Board's decision "sufficiently informed" petitioner of the disposition of all petitioner's exceptions (see page 9a, *infra*). But the Court of Appeals nowhere suggested how the Board could be deemed to have informed petitioner of the Board's views on the issue of a fair hearing which petitioner had expressly raised, which we have already discussed, and as to which the Board had said absolutely nothing whatever.

Thereafter, on April 25, 1960, petitioner filed in the Court of Appeals its "petition for rehearing, application for rehearing en banc, petition to reopen the record and to adduce additional evidence."

With respect to reopening the record, this document made formal application that the Court of Appeals remand the case to the Labor Board to adduce additional evidence, pursuant to Section 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e). Petitioner's application was based on an attached affidavit by Neal (Neal and Coker were the two employees found to have been discriminatorily discharged—see page 4, *supra*), which petitioner stated to be now for the first time available. Neal's affidavit is dated April 13, 1960, which is subsequent to the decision of

the Court of Appeals. In the affidavit Neal states that it was he (Neal) and Coker who had moved petitioner's microwave unit, by using their maximum force, for the purpose of displacing it to cause an interruption in the television broadcasts on the night of June 1, 1956; that the business agent of the Union encouraged them to accomplish this act and gave them instructions as to the manner in which they could gain access to the theatre roof where the microwave unit was located.[7] The affidavit also states that during the period of the strike, the strikers who picketed in the rear of the studios regularly participated in the scratching of automobiles of petitioner's non striking employees; that Neal had personally participated in such scratching of automobiles; that Coker had scratched the automobile of one of the petitioner's employees named Renek. The affidavit states that Neal is prepared to testify before the Board in accordance with the statements therein made.

The Board's General Counsel filed in the Court of Appeals a response to the petition for rehearing. In this response the General Counsel opposed a rehearing and stated, among other things, that Coker on May 6, 1960, had executed an unsolicited affidavit denying what was in Neal's affidavit.

On June 1, 1960, the three-judge panel which had decided the case denied petition for rehearing (page 10a, *infra*). Also on June 1, 1960, petition for rehearing *en banc* was denied in an order (pages 10a-11a, *infra*) which showed that, for the purpose of passing upon the petition for rehearing *en banc*, the Court of

[7] Coker in his testimony at the hearing had indicated that he had not even been down in the Studio area where the microwave unit was located (Tr 1177-1178).

Appeals had constituted itself to include six judges—namely, the five active circuit judges of the Tenth Circuit, plus Judge Huxman, a retired circuit judge (date of retirement, April 1, 1957—see 240 F. 2d at xvi), who had been one of the panel which originally heard the case. The Court of Appeals did not, in these orders or elsewhere, expressly say anything concerning petitioner's petition that the case be remanded to the Labor Board to adduce additional evidence. The Court of Appeals entered its enforcement decree on June 3, 1960 (page 11a, *infra*).

REASONS FOR GRANTING THE WRIT

I

This Court's decision in *United States* v. *American-Foreign SS. Corp.*, 363 U.S. 685, 691, decided June 20, 1960, has settled that "under existing legislation a retired circuit judge is without power to participate in an *en banc* Court of Appeals determination, and accordingly that the judgment [in a case where he did so] must be set aside."

Whether or not to set a case down for *en banc* rehearing is a determination arising under the identical subsection of the Code, 28 U.S.C. § 46(c), quoted at page 13a, *infra*. A judge's eligibility to be a part of the court constituted to determine whether rehearing *en banc* should be granted is a matter equally dependent on the proper meaning of the word "active", which this Court now has definitively construed. Under the statutory scheme the Court of Appeals cannot constitute itself so as to include a retired circuit judge as a participant in its determination whether to grant a rehearing *en banc*, any more than it can include a retired circuit judge as a participant in its determination of a rehearing *en banc* which has been granted.

Whatever may be the latitude inhering in the Court of Appeals to establish its own *en banc* procedure, *Western Pacific Railroad Case*, 345 U.S. 247, the Court of Appeals plainly cannot constitute itself for this purpose in a manner precluded by the statute. Accordingly, when the Tenth Circuit constituted itself so as to make Senior Circuit Judge Huxman (who retired in 1957) a participating member of a court of six judges to determine whether rehearing *en banc* should be granted (see pages 12-13, *supra*), the Tenth Circuit acted contrary to the principles of law which this Court's decision has now settled. It also acted directly in conflict with the decisions and actions of the Seventh Circuit, *G. H. Miller & Co.* v. *United States*, 260 F. 2d 286 (1958), certiorari denied, 359 U.S. 907, and of the Second Circuit, *Reardon* v. *California Tanker Co.*, 260 F. 2d 369, 375-376 (1958), certiorari denied, 359 U.S. 926, as well as in conflict with the procedure which the Ninth Circuit has established by its Rule 23.[5]

The question, moreover, is important to orderly administration of the work of the federal courts and to proper handling of applications for rehearing *en banc* —not only in the Tenth Circuit but in other circuits as well.

It would be no answer to argue that, because the five active circuit judges of the Tenth Circuit also participated in the consideration of this petition for rehearing *en banc*, therefore no sufficient showing of

[5] And compare the District of Columbia Circuit, as illustrated by *Porter* v. *Herter*, 278 F. 2d 280 (1960), petition for certiorari pending, No. 298, where Mr. Justice Burton, retired, participated in the three-judge panel which decided the case, but did not participate in the determination of the Court of Appeals, by its nine active judges, by order dated May 9, 1960, to deny the petition for rehearing *en banc*.

prejudice has been made. A litigant is entitled to a lawfully constituted court just as, for example, a defendant in a criminal case is entitled to a lawfully constituted jury. The prejudice is the plain departure from the statutory plan. Here the Court of Appeals as it constituted itself to pass upon the *en banc* application "was virtually no court at all, because not organized in conformity to law." *Wm. Cramp Sons* v. *Curtiss Turbine Co.*, 228 U.S. 645, 652. Furthermore, it cannot be known what weight was given, in the court's deliberations, to views expressed by Judge Huxman concerning whether the petition for rehearing *en banc* should be granted or denied. Compare *Ayrshire Collieries Corp.* v. *United States*, 331 U.S. 132, 139. Nor can it be known whether there were dissents which were not publicly announced. And by unlawfully increasing the number of participating judges from five to six, the Tenth Circuit likewise improperly increased from three to four the number necessary to constitute the requisite majority in favor of rehearing *en banc*.

Petitioner was and is entitled to have its petition for rehearing *en banc* determined by a court constituted according to law. The order denying rehearing *en banc*, issued by a six-judge Court of Appeals constituted so as to include an ineligible judge, must accordingly be vacated. *American Const. Co.* v. *Jacksonville Railway*, 148 U.S. 372, 387, relied on in *United States* v. *American-Foreign SS. Corp.*, *supra*; *Moran* v. *Dillingham*, 174 U.S. 153; *Wm. Cramp Sons* v. *Curtiss Turbine Co.*, *supra*.

II

Under a system of law such as ours, where vast substantive powers have been delegated to administrative

agencies, the requirement that the agency afford fair hearing becomes a paramount necessity. As this Court said only the other day, "when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process." *Hannah* v. *Larche*, 363 U.S. 420, 442.

The present case reflects a flagrant departure from these salutary principles. A full hearing "means that every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 202. As has been shown (pages 5-11, *supra*), a basic issue in this proceeding was whether certain acts of serious misconduct had been committed by, or were otherwise attributable to, any of the employees being reinstated by Board order; if so, then both the Board and the Court of Appeals acknowledged that the employees guilty of such serious misconduct would be ineligible for reinstatement. Nevertheless, at the hearing the trial examiner entirely cut off petitioner from establishing a connection between the serious misconduct and the striking employees; although the striking employees were in the hearing room under subpoenas issued at petitioner's request, the trial examiner would not allow them to be interrogated as to questions of fact within their direct knowledge which would have established whether or not such connection existed. Petitioner was then held in default for not having established the connection.

This arbitrary procedure was a gross and indefensible denial of fair hearing to petitioner on an issue important to the attainment of a just result in this proceeding. It is an issue important to petitioner not only for pecuniary reasons but also for the future conduct of its business: a television station having a large investment in delicate electronic equipment would be justifiably reluctant to reinstate anyone who had tampered with its telecasting equipment or had committed acts of property destruction or other serious acts of misconduct. By wholly preventing petitioner from adducing this clearly competent evidence, the Labor Board denied petitioner the due process of law guaranteed by the Fifth Amendment, as well as denied petitioner's statutory rights to a fair hearing which are safeguarded by Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), and by Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 1006(c), all quoted at page 13a, *infra*.

On this procedural issue petitioner's position—besides being plainly correct as a matter of principle—finds full support in decisions rendered in Labor Board cases by at least two other circuits. As the Eighth Circuit has put the matter, "That a refusal by an administrative agency such as the National Labor Relations Board to receive and consider competent and material evidence offered by a party to a proceeding before it, amounts to a denial of due process is not open to debate". *National Labor Relations Board* v. *Burns*, 207 F. 2d 434, 436 (8th Cir. 1953); *Donnelly Garment Co.* v. *National Labor Relations Board*, 123 F. 2d 215, 224 (8th Cir. 1941). The Sixth Circuit has made the identical ruling. *National Labor Relations Board* v. *Tennessee-Carolina Transp.*, 226 F. 2d 743 (6th Cir. 1955).

The Tenth Circuit should have done the same in the present case. Its failure to do so puts it in conflict with these other circuits on an important matter of principle, and constitutes error of serious dimensions calling for review and correction by this Court.

III

The Tenth Circuit's decision here concerning Section 8(b) of the Administrative Procedure Act, 5 U.S.C. § 1007(b), involves a significant question of administrative law deserving review by this Court, particularly in the light of contrary decisions by other circuits.

Section 8(b) of the Administrative Procedure Act (quoted at page 14a, *infra*) was intended to impose upon administrative agencies certain minimum statutory standards of articulateness. It specifically requires the Labor Board to show in the record its ruling upon each exception taken to the trial examiner's intermediate report; it further requires the Board to include in its decision a statement of findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion, presented on the record.

The need for this procedural reform was widely recognized when the Administrative Procedure Act was enacted.[9] Congress intended to assure that in adjudi-

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[9] The purposes of Section 8(b) appear from the following statement made in the House by the Chairman of the Committee on the Judiciary (see Legislative History of the Administrative Procedure Act, compiled in S. Doc. No. 248, 79th Cong., 2d Sess., p. 367):

> "One matter should be emphasized. Section 8(b) requires findings and conclusions to be stated upon all the material

catory proceedings it would not be possible for the administrative agency to dispose of a material issue by burying the issue with silence.

In the present case one of the major material issues has been the denial of fair hearing (see pages 5-11, 15-18, *supra*). Since the issue as to fair hearing was clearly a material issue, the statutory requirements of Section 8(b) are not only applicable but mandatory. *Minneapolis & St. Louis R. Co.* v. *U.S.*, 361 U.S. 173, 192-194.

As already noted (see page 9, *supra*), when seeking review of the trial examiner's intermediate report, petitioner addressed to the Board a suitable exception on this issue. Apart from the Board's omnibus recital which does not specifically mention this issue (see pages 9-10, *supra*), the Board said nothing whatsoever about the issue. The Board did not render any explicit ruling on the exception. Nor did the Board give any reasons why it thought that the exception should be overruled and petitioner's contention rejected. Contrary to what the Court of Appeals intimated (see page 11, *supra*, and page 9a, *infra*), the Board has not in the slightest degree informed petitioner as to the

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issues of fact which the parties may present. This means that, within the legal framework of the type of case involved, the number and the subjects of the findings and conclusion will be determined by the record and by the legal, factual, or discretion issues raised by the parties. The mere parroting of findings or conclusions in the words of statutes, however sufficient that may be as an ultimate conclusion, definitely would not satisfy in any manner the requirements of this section unless both the statute and the issue were very narrow indeed. Almost any case of consequence involves numerous and detailed issues of law, fact, and discretion. These must all be determined as a part of the decision. Only in that manner are the parties protected and assured that the case has been fully and completely considered and determined."

Board's reasons or grounds of decision concerning this important fair hearing issue. In other words, in the very situation where Congress has required the Board to be articulate, the Board instead stood mute.

By sanctioning this slipshod and unlawful procedure, the Court of Appeals has allowed the Board to flout the express requirements and the manifest purposes of Section 8(b) of the Administrative Procedure Act. This the Court of Appeals has done in a manner creating direct conflict with decisions of several other circuits on a question of large and recurring importance in the field of administrative law.

The Third Circuit, for example, has made it clear that, especially in view of the requirements of Section 8(b) of the Administrative Procedure Act, "the final order of an administrative agency must include findings and conclusions upon all material issues presented on the record"; that "the reasons or basis for the decision must also be clearly enunciated"; and that "a bare conclusion is insufficient even when prefaced by a statement that it was reached after careful consideration of all the evidence". *In re United Corporation*, 249 F. 2d 168, 179-181 (3d Cir. 1957). Similarly, the Eighth Circuit has held that a "mere assertion" that the agency has examined all of the available evidence of record "does not suffice" to comply with Section 8(b). *State Corp. Com'n of Kan. v. Federal Power Commission*, 206 F. 2d 690, 723 (8th Cir. 1953). The District of Columbia Circuit is likewise insistent that agencies comply with the statute by making the basis of their action "reasonably clear"; that courts not "be left to guess, with respect to any material issue, . . . which of several alternatives the [agency] had in mind"; and

that Section 8(b) cannot be satisfied by an omnibus statement of reasons which "comes to little more than this: For one reason or another, all the exceptions not granted are overruled." *Radio Station KFH Co.* v. *Federal Communications Com'n*, 247 F. 2d 570, 572 (D.C. Cir. 1957). And the Fourth Circuit has shown comparable firmness in vacating agency orders where "no reasons are advanced in the [agency's] opinion, if in fact reasons exist." *South Carolina Generating Co.* v. *Federal Power Com'n*, 249 F. 2d 755, 764 (4th Cir. 1957).

In view of the vast substantive powers lodged in administrative agencies, it is especially necessary that the courts should compel administrative agencies to comply with the statutory requirements of Section 8(b) in connection with basic procedural issues, such as the fair hearing issue presented here. "The administrative process will best be vindicated by clarity in its exercise." *Phelps Dodge Corp.* v. *Labor Board*, 313 U.S. 177, 197. From the decisions cited, it appears that in at least four circuits—the Third, the Fourth, the Eighth, and the District of Columbia Circuit—the Labor Board's order in the present case would not have been enforced on account of the Board's failure to comply with the minimum standards of Section 8(b). This Court should exercise its supervisory jurisdiction to bring the Labor Board and the Tenth Circuit into harmony with those decisions.

IV

In its treatment of petitioner's request that the case be remanded to the Labor Board for adducing additional evidence, the Court of Appeals has so far departed from the accepted and usual course of judicial

proceedings as to call for an exercise of this Court's power of supervision.

An application under Section 10(e) of the National Labor Relations Act (quoted at page 14a, *infra*) to remand a proceeding to the Labor Board for adducing additional evidence is an application addressed to the "sound judicial discretion" of the Court of Appeals. *Southport Petroleum Co.* v. *Labor Board*, 315 U.S. 100, 104; *Labor Board* v. *Donnelly Garment Co.*, 330 U.S. 219, 233-234; *Labor Board* v. *Mexia Textile Mills*, 339 U.S. 563, 569. But the discretion is not absolute; it is reviewable by this Court for abuse of discretion, for arbitrariness, for failing to proceed in accordance with applicable legal standards, or for otherwise exceeding the bounds of judicial discretion. *Labor Board* v. *Indiana & Michigan Electric Co.*, 318 U.S. 9; cf. *Communist Party* v. *Control Board*, 351 U.S. 115; *In re Burwell*, 350 U.S. 521, 522. The present case strongly calls for such review.

As already noted (pages 11-13, *supra*), at the time of its petition for rehearing in the Court of Appeals, petitioner petitioned the Court of Appeals to remand the case so that it could be reopened before the Board. The Neal affidavit, on which this petition for remand was based, was stated to be then for the first time available to petitioner. The Neal affidavit set forth sworn statements highly material to showing the commission of acts of serious misconduct by Coker and other striking employees; and if this new evidence were to be accepted by the Board, then Coker and certain others would clearly be barred from reinstatement. In addition, the Neal affidavit contained sworn statements which raised important questions for the Board to consider concerning Coker's credibility, particularly since

the trial examiner and the Board had relied heavily on Coker's credibility in deciding the case (see pages 4-5, *supra*).

The Court of Appeals failed to make any express ruling on the petition to remand for reopening the record (see page 13, *supra*). Since the Court of Appeals did deny rehearing and thereafter did enter an enforcement decree, apparently the petition to remand for reopening the record has been either denied by implication, or else totally ignored, by the Court of Appeals. In any event, on this record the Court of Appeals' disposition of the matter does not begin to fulfill the requirements of applicable legal standards.

Under Section 10(e) of the National Labor Relations Act, the Court of Appeals before making such a remand must be satisfied as to two things. First, the additional evidence must be "material". This condition was fully met here; if the Court of Appeals thought otherwise, its position would be untenable and would require reversal. Second, there must be "reasonable grounds for failure to adduce such evidence in the hearing before the Board". Here petitioner expressly informed the Court of Appeals that the Neal affidavit had now become for the first time available; there is nothing in the record contradicting this, or suggesting that the evidence was previously available to petitioner or that petitioner was at fault for its unavailability.

Under the circumstances the Court of Appeals has handled this important matter with utter lack of clarity, leaving in doubt exactly what action it was taking and what grounds it was relying on. And by its failure to remand it has, in effect, usurped the functions of

the Board; it has prevented the Board, which is essentially the sole judge of the facts, from deciding what weight should be attached to this important new evidence in the context of the entire record.

The issue here relates to the manner in which the Court of Appeals has discharged the discretionary responsibility conferred directly upon it by Section 10(e). No appellate review whatsoever is available, except in this Court. The present case is an especially appropriate occasion for such appellate review to be exercised.

CONCLUSION

For each and all of the reasons which have been set forth, this case amply warrants review by this Court. The petition for certiorari should accordingly be granted.

Respectfully submitted,

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August 12, 1960

APPENDIX A

Opinion, Orders and Decree of Court of Appeals

APPENDIX A

DECISION

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

WICHITA TELEVISION CORPORATION, INCORPORATED, d b a KARD-TV, *Respondent*.

No. 6153

United States Court of Appeals Tenth Circuit

April 5, 1960

Duane B. Beeson, Atty., N. L. R. B., Washington, D. C. (Stuart Rothman, Gen. Counsel, Thomas J. McDermott, Associate Gen. Counsel, Marcel Mallet-Prevost, Asst. Gen. Counsel, Washington, D. C., and Standau E. Weinbrecht, Atty., N. L. R. B., Washington, D. C., on the brief) for petitioner.

George J. Boft, Washington, D. C., and Daniel M. Moyer, Wichita, Kan., for respondent.

Before BRATTON, HUXMAN and PICKETT, Circuit Judges.

PICKETT, Circuit Judge.

The National Labor Relations Board has petitioned for a decree enforcing its order requiring respondent, Wichita Television Corporation, Inc., d b a KARD-TV, to offer reinstatement with back pay to employees found to have been either discharged in violation of the National Labor Relations Act, 29 U.S.C.A. § 151 et seq., or denied reemployment to which they were entitled under the Act; to cease and desist from discouraging union membership, interfering with, coercing or restraining its employees in the exercise of their rights under the Act; and to post appropriate notices.

The principal questions arise out of the contention that the record as a whole does not sustain either the finding

that respondent was guilty of unfair practices in discharging two employees for union activities and coercing employees through interrogations and threats, or the conclusion that the striking employees who unconditionally requested reinstatement were entitled to be offered reemployment even though replacements had been hired.

In May of 1956 Gordon Coker, a television director in the employ of respondent, began distributing union[1] membership cards to his fellow production department employees. Apparently this was the first outward display of union interest among this group. On May 10 a large majority of these employees held a meeting at which they agreed to send respondent a letter containing their names and requesting that the Union be recognized as their chosen bargaining representative. The next day, shortly after receiving this letter, Coker, and Frank Neal, another employee, were discharged. Neal was not actually working at the time. He had previously quit his employment but had been rehired and was to report for work at a later date but, on May 11 he was told he would not be allowed to do so.[2] Within a week both Coker and Neal formally requested reinstatement but their requests were ignored. On May 31 the production department employees met again and, in the presence of two Union representatives, discussed a plan of action. They decided to make

[1] The Union was known as "IATSE". The full name is International Alliance of Technical Stage Employees & Moving Picture Machine Operators of the U. S. & Canada, Motion Picture Projectionists, Local No. 414, AFL-CIO.

[2] The Board found that on May 6 Neal had approached Moyer and requested his old job back; that Moyer referred him to the production supervisor, Renek, who informed Neal that he was to return to work on the 13th. From these findings the Board concluded that Neal had been rehired and was an employee on the 11th, so that Renek's action amounted to a discharge as specified in the formal charge filed by the Board, and not, as respondent contends, a discriminatory refusal to rehire, which was not charged.

one final request for a meeting with management to discuss recognition, grievances and bargaining, and then if that request were rejected, to strike. Pursuing this plan, some twenty employees struck on June 2 after their request for a meeting was ignored. Respondent immediately terminated the employment of the strikers by hiring replacements who were given permanent employment. When the strike ended and the strikers requested unconditional reinstatement on July 16, substantially all of their jobs had been filled and the reinstatement requests were not recognized.

On May 15 the Union filed formal charges protesting the alleged discriminatory discharges of Coker and Neal. On December 26, after it had become evident that none of the strikers was to be reinstated, the Union filed an amended charge protesting the respondent's denials of the several requests for reinstatement of the alleged unfair labor practice strikers.[3]

The Board found that respondent interfered with its employees' rights by discharging Coker and Neal and by coercing employees through interrogations and threats. The Board did not consider all of the several instances of questioning and threats of which the Trial Examiner made findings in reaching his conclusion as to this second method of interference; rather, the Board expressly found only that there were a sufficient number of such instances to warrant the inference that respondent's union hostility was behind the discharges. But the Board's general adoption of the Examiner's findings supplies an adequate source

[3] The complaint, based upon these charges, alleged that the respondent committed unfair labor practices by discharging Coker and Neal in violation of Section 8(a) (3) and (1) of the Act, by refusing to reinstate the unfair labor practice strikers upon their unconditional requests, also in violation of Section 8(a) (3) and (1), and by coercing and restraining the employees in the exercise of their Section 7 rights, in violation of Section 8(a) (1) of the Act.

for that portion of its order requiring respondent to cease interference by means unrelated to discrimination with regard to hire and tenure. It is clear that in finding interference by coercion and threats, the Trial Examiner and the Board relied principally on such of respondent's conduct as was directed at Coker and Neal before they were discharged. That conduct was covered by the charge filed on May 15. But the Trial Examiner and the Board also relied on several instances occurring both before and after May 15, involving employees other than Coker and Neal. Respondent contends that this was error because the two formal charges provided no notice that such instances of conduct would be made the subject of Board inquiry. The short answer to this contention is that respondent's conduct directed at Coker and Neal and included in the May 15 charge warranted the Board in restraining future interference by coercion and threats. Moreover, the Board has considerable latitude in considering conduct not specifically charged which is subsequent and related to practices protested against in the formal charge. National Licorice Co. v. N. L. R. B., 309 U.S. 350, 60 S. Ct. 569, 84 L. Ed. 799; N. L. R. B. v. Fant Milling Co., 360 U.S. 301, 79 S. Ct. 1179, 3 L. Ed. 2d 1243.

This brings us to a consideration of the two factual issues respecting, first, the real reason behind the Coker and Neal discharges and, second, the motivating cause or causes of the subsequent strike. Upon consideration of the record as a whole, we find adequate support for the Board's conclusions that Coker and Neal were discharged because of their union adherence or activities and that these discharges were an effective cause of the strike. Renek, the production supervisor, talked to Coker the day before his discharge, asking him if he knew of "this union business going on," and then saying: "If you hear anything, let me know because Mr. Moyer said we have to get rid of them." Later that same day Renek asked Frank Neal: "What do you know about this Union?", and told him

"we have got to have names of people who are organizing, behind this." A sales manager telephoned Coker's home on May 10 and, after Coker had denied having any knowledge of the Union, explained to him that "It is a union that is trying to get in here and we have to stop them."

The record is replete with evidence which establishes respondent's determination to be rid of employees actively engaged in union organization. Other evidence shows that respondent believed Coker and Neal to be organizers and discharged them for that reason. Bob Edwards, the Chief Announcer in Charge, correctly surmised, while discussing the union situation with another announcer, that Coker was the "organizer" directly responsible for the union interest which that announcer professed to have. Neal, after being interrogated by Renek as related above, asked Moyer if management thought he was returning to work primarily to help organize the production employees, and Moyer answered: "It kind of looks that way." Within a very short time after the Union letter of May 11 was received, Coker was discharged and Neal was told he was not to report back to work on May 13.

The Board also concluded, reasonably we think, that the discharges were not actually prompted by the legitimate reasons which respondent suggests existed. The respondent's evidence was to the effect that the day before his discharge, Coker "told off" Renek by predicting that once the Union had successfully completed organizing, it would do the hiring and firing of employees and Renek's authority would be reduced to where he would have to be careful how he treated the employees; that management officials met the next morning at which time Renek related what Coker had said to him the previous day, whereupon the officials agreed that Coker would have to be discharged because in the future there could not possibly be adequate cooperation between him and Renek, his supervisor. It is apparent the Board considered that, even assuming Coker had made these statements to Renek, the more

reasonable inference, in view of respondent's conduct after learning of the plan to organize the production department, was that Coker was discharged because of his union adherence and activities. Inferences to be drawn from the evidence are for the Board, not the Courts. The jurisdiction of courts of appeals is limited under the Act to a determination of the validity of the final order of the Board, and to the enforcement of that order. 29 U.S.C.A. § 160 (e); N. L. R. B. v. Hamilton, 10 Cir., 220 F. 2d 492; cf. N. L. R. B. v. Cheney Cal. Lumber Co., 327 U.S. 385, 66 S. Ct. 553, 90 L. Ed 739.

To explain its action with respect to Neal, respondent introduced evidence of Neal's May 6th request for reemployment and of a seemingly final agreement, reached two days later by Moyer and another supervisor, to deny the request. However, respondent's evidence also shows no further steps were taken until the May 11th management meeting, which took place on the morning the first Union letter was received, when it was decided, after discussion, that Neal's habit of burdening supervisors with his personal problems required a denial of his request. We agree with the Board that the time lapse of several days between the making and denial of Neal's request, during which time it appeared he would be returning to work on May 13, is inconsistent with management's supposedly low esteem for Neal. These circumstances support the Board's conclusion that the real reason Neal was never allowed to return to work was respondent's belief that he was a union adherent and organizer. Cf. Phelps Dodge Corporation v. N. L. R. B., 313 U.S. 177, 61 S. Ct. 845, 85 L. Ed. 1271.

Respondent attacks on two grounds the Board's finding that the discharges were the substantial cause of the strike. The first argument is that the Board's finding was erroneously predicated on its mistaken belief that the Trial Examiner had found the discharges to have been a substantial cause of the strike. While it is true the Trial Examiner found only that the discharges were in part responsible for

the strike, the Board, in addition to adopting the Examiner's findings on this point, expressly found that the discharges were an "effective cause" of the strike. The Board was free to make its own independent factual determination as it did in this case. Universal Camera Corp. v. N. L. R. B., 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed. 456.

Respondent also argues that the record as a whole discloses the strike was economic and called solely because of respondent's failure to bargain, and that the evidence did not justify the Board in finding the alleged unfair practices were a substantial cause. Several employees who attended the May 31st meeting testified how the decision to strike was made at that time. It is quite clear that the discharges of Coker and Neal were discussed at the meeting, and the evidence fairly supports the view that a majority of the employees in attendance agreed to strike if no immediate headway were made toward making arrangements to discuss with management the questions of bargaining and the discharges. Immediately after Coker and Neal were fired, the Union made efforts to secure their reinstatement and filed unfair labor charges on their behalf. There was evidence that the motions to strike, made at the May 31st meeting, included references to the discharges. One witness testified that at this meeting "There was a discussion amongst the individuals themselves, and the general consensus of opinion was that we feared very much for Mr. Neal and Mr. Coker after they had been fired as a result of union activities." When the strike did commence several days later, some of the picket signs protested the discharges of these two employees, and handbills distributed to the public contained like protests.

Striking employees are upon request entitled to reinstatement if unfair labor practices are the cause or one of the operative causes of their strike. Mastro Plastics Corp. v. N. L. R. B., 350 U.S. 270, 76 S. Ct. 349, 100 L. Ed. 309; Wheatland Electric Coop. v. N. L. R. B., 10 Cir., 208 F. 2d 878, certiorari denied 347 U.S. 966, 74 S. Ct. 777, 98 L. Ed.

1108; N. L. R. B. v. Barrett Co., 7 Cir., 135 F. 2d 959; N. L. R. B. v. Stackpole Carbon Co., 3 Cir., 105 F. 2d 167, certiorari denied 308 U.S. 605, 60 S. Ct. 142, 84 L. Ed. 506; N. L. R. B. v. Remington Rand, Inc., 2 Cir., 94 F. 2d 862, certiorari denied 304 U.S. 576, 58 S. Ct. 1046, 82 L. Ed. 1546. We conclude that the record, considered as a whole, establishes that there was a sufficiently close causal connection between the discharges and the strike to warrant the reinstatement of the strikers.

However, respondent resists enforcement of that remedy because of alleged misconduct by strikers. Several of respondent's officers observed strikers picketing more than two abreast in front of the KARD-TV station, carrying large, obtrusive umbrellas on the picket line, standing in a recessed doorway to the station, heckling non-striking employees, and engaging in other similar activities. In addition there were several serious occurrences for which respondent sought to saddle the strikers with the blame, such as tire-slashings of automobiles belonging to non-striking employees, and the shifting of a large microwave unit from its proper telecasting position. Respondent contends it was justified in refusing to reinstate the strikers because it reasonably believed at least some of them were responsible for these serious occurrences. The strike having been caused by unfair labor practices, the strikers are entitled to reinstatement unless there was evidence of such misconduct of the strikers as to make that remedy inappropriate. It is clear that none of the misconduct attributed by the evidence to the identified strikers was of such a serious nature as to warrant denial of reemployment. These incidents fall far short of violence and are normal outgrowths of the intense feelings developed on picket lines. Cafeteria Employees Union, Local 302 v. Angelos, 320 U.S. 293, 64 S. Ct. 126, 88 L. Ed. 58; N. L. R. B. v. Longview Furniture Co., 4 Cir., 206 F. 2d 274. There was evidence of acts of a serious nature during the maintenance of the picket line, but there was no proof that any identified striker, or for

that matter any unidentified striker, took part in such acts. The law is settled that an employee's disqualification for reinstatement must be based upon evidence that he personally participated in the misconduct. International Ladies' Garment Workers' Union, A. F. L. v. N. L. R. B., 99 U.S. App. D.C. 64, 237 F. 2d 545; N. L. R. B. v. Marshall Car Wheel & Foundry Co., 5 Cir., 218 F. 2d 409; N. L. R. B. v. Crowley's Milk Co., 3 Cir., 208 F. 2d 444; N. L. R. B. v. Deena Artware, Inc., 6 Cir., 198 F. 2d 645; N. L. R. B. v. Walljek, 3 Cir., 198 F. 2d 477, 485, note 10; N. L. R. B. v. Stackpole Carbon Co., supra.

Respondent also has advanced several miscellaneous grounds in opposition to enforcement. The first concerns the Board's failure to expressly rule on each of respondent's 144 special exceptions to the intermediate report. Title 5 U.S.C.A. § 1007(b) (Section 8(b) of the Administrative Procedure Act) requires an agency to rule on exceptions made to the recommended decisions of that agency's subordinate officers. This requirement can be satisfied, however, without specific, separate rulings on each exception. N. L. R. B. v. State Center Warehouse & Cold Storage Co., 9 Cir., 193 F. 2d 156; N. L. R. B. v. Sharples Chemicals, Inc., 6 Cir., 209 F. 2d 645. The Board's decision, including that part adopted from the Trial Examiner's report, sufficiently informed respondent of the disposition of all of its exceptions. Respondent also contends the Trial Examiner erred in denying its motion to take the deposition of Harry Renek, who had left the employ of KARD-TV in August of 1956, sometime between the filing of the first formal charge with the Board and the hearing before the Trial Examiner. Respondent's counsel conceded that the only efforts to locate Renek consisted of several telephone calls. At the beginning of the hearing the Trial Examiner agreed to issue a subpoena demanding Renek's appearance as a witness, but counsel persisted in his request to take a deposition and did not take advantage of the subpoena procedure until later in the hearing. Since Renek apparently was never located for

the purpose of serving the subpoena, it is not shown that his deposition could have been secured. The motion was addressed to the sound discretion of the Trial Examiner and it has not been made to appear that the denial of the motion was clearly prejudicial. N. L. R. B. v. Gala-Mo Arts, Inc., 8 Cir., 232 F. 2d 102. We find no merit in the contention that the Examiner was biased and prejudiced against respondent to such an extent as to invalidate the order. As to the several other contentions of respondent, they have been disposed of by what has heretofore been said or have been considered and found to be without merit.

The order will be enforced.

ORDER DENYING REHEARING

Order: Respondent's petition for rehearing—denied.

Second Day, May Term, Wednesday, June 1st, 1960.

Before Honorable Sam C. Bratton, Honorable Walter A. Huxman and Honorable John C. Pickett, Circuit Judges.

This cause came on to be heard on the petition of respondent for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

ORDER DENYING REHEARING EN BANC

Order: Respondent's petition for rehearing en banc—denied.

Second Day, May Term, Wednesday, June 1st, 1960.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable Sam C. Bratton, Honorable Walter A. Huxman, Honorable John C. Pickett, Honorable David T. Lewis and Honorable Jean S. Breitenstein, Circuit Judges.

This cause came on to be heard on the petition of respondent for a rehearing herein en banc and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

DECREE

Before: Bratton, Hufxman and Pickett, Circuit Judges.

This Cause came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against Wichita Television Corporation, Incorporated, d b a KARD-TV, it officers, agents, successors and assigns, on December 1, 1958. The Court heard argument of respective counsel on January 4, 1960, and has considered the briefs and transcript of record filed in this cause. On April 5, 1960 the Court, being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

On Consideration Whereof, it is ordered, adjudged and decreed by the United States Court of Appeals for the Tenth Circuit that the said order of the National Labor Relations Board, as corrected and amended in said proceeding be enforced, and that Wichita Television Corporation, Incorporated, d b a KARD-TV, its officers, agents, successors and assigns, abide by and perform the directions of the Board in said order contained.

s John C. Pickett
Judge, United States Court of Appeals for the Tenth Circuit

Dated: June 3, 1960

APPENDIX B

Constitutional and Statutory Provisions Involved

APPENDIX B

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Code provision relating to Court of Appeals rehearings *en banc*, 29 U.S.C. §46(c), provides as follows:

> (c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit.

2. The Fifth Amendment provides in part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

3. Section 10(b) of the National Labor Relation Act as amended, 29 U.S.C. §160(b), provides in part:

> The person so complained of [by a complaint charging unfair labor practice] shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. . . . Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28.

4. Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §1006(c), relating to hearings, provides in part:

> Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

5. Section 8(b) of the Administrative Procedure Act, 5 U.S.C. §1007(b), relating to decisions, provides in part:

> (b) Prior to each . . . decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions . . . exceptions to the decisions or recommended decisions of subordinate officers . . . The record shall show the ruling upon each such . . . exception presented. All decisions . . . shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record: . . .

6. Section 10(e) of the National Labor Relations Act as amended, 29 U.S.C. §160(e), provides in part:

> If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order.

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In the Supreme Court of the United States

OCTOBER TERM, 1960

WICHITA TELEVISION CORPORATION, INCORPORATED, D/B/A KARD-TV, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 318

WICHITA TELEVISION CORPORATION, INCORPORATED, D B A KARD-TV, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 1a-10a) is reported at 277 F. 2d 579. The orders of the Court of Appeals denying the petition for rehearing and the petition for rehearing *en banc* (Pet. 10a-11a) are not reported. The Board's Decision and Order (R. 70-83, 8-66) is reported at 122 NLRB 222.

JURISDICTION

The decree of the court below (Pet. 11a) was entered on June 3, 1960. The petition for a writ of certiorari was filed on August 12, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Trial Examiner acted within his discretionary authority to control the presentation of evidence in sustaining objections to a line of questioning by petitioner's counsel.

2. Whether the Board adequately informed petitioner of the basis of its disposition of the exception taken to the ruling of the Trial Examiner with respect to such questioning.

3. Whether the Court of Appeals properly exercised its discretion in declining to reopen the record for the taking of additional evidence.

4. Whether the order of the Court of Appeals denying the petition for rehearing *en banc* was valid.

STATUTE INVOLVED

The relevant statutory provisions are set forth in the Appendix to the Petition (Pet. 13a-14a).

STATEMENT

A. The proceedings before the Board

1. *The Board's findings and order*

Union organizational activities among petitioner's production employees at its television station in Wichita, Kansas, began in May, 1956 (R. 10; 114-115). Within a few days, petitioner's officials became aware of the activity and took immediate steps to identify its leaders and to discourage its success. Employees were questioned about their knowledge of the Union[1] and were requested to report anything they heard (R. 98-99, 151, 193). On May 11, 1956, petitioner received a letter requesting recognition of the Union, and naming the employees who had designated it as their bargaining representative (R. 104-105, 119-120, 523-525). An hour later, petitioner discharged employee Gordon Coker, who had been identified to petitioner as the leader of the Union movement (R. 104-105, 120, 126-127). Later the same day, petitioner discharged employee Frank Neal, who had been previously questioned by petitioner's production supervisor about the Union (R. 150-152, 193-194).

Petitioner continued to express its opposition to the Union by questioning and threatening employees respecting their union activities, and on June 2, 1956, the employees struck in protest against the discharges

[1] International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States and Canada, Motion Picture Projectionists, Local 111, AFL-CIO.

of Coker and Neal and petitioner's refusal to recognize the Union (R. 144-145, 174-175, 194, 208-209, 213-214, 220-222, 226, 229, 282, 425). Petitioner called the employees who did not report for work and who were not on the picket line, and threatened them with discharge if they failed to cross the picket line (R. 188, 222-223, 282, 143-144). Petitioner thereafter replaced all those who did not come to work (R. 459-460). Picketing ceased and the striking employees applied for reinstatement on July 16, 1956, but petitioner did not put any of the strikers back to work. The Union again requested by letter in December, 1956, that the strikers be reinstated, but petitioner did not reply, nor did it inform the Union or the strikers of its reasons for denying them reinstatement (R. 396-397, 402, 530, 531).

The Board concluded, upon the basis of the foregoing, that petitioner violated Section 8(a)(3) and (1) of the Act by discharging employees Coker and Neal and by refusing to reinstate the strikers upon their request to return to work, and that petitioner committed independent violations of Section 8(a)(1) by threatening and interrogating its employees about the Union. The Board also found that the strike was caused, at least in part, by petitioner's unfair labor practices, and accordingly, in addition to enjoining the unlawful conduct of petitioner, it ordered that the strikers be reinstated with back pay to the date of their request for reinstatement. (R. 70-80).

2. The Trial Examiner's ruling on the exclusion of evidence relating to misconduct of the strikers

During the hearing before the Trial Examiner, counsel for petitioner called one of the strikers, Darrell McOsker, to the stand and asked a series of questions which were designed to show "the knowledge that these pickets had" as to the identity of persons who had committed tortious acts during the strike (R. 431, 425-430). It had previously been established that property damage to petitioner and some of the non-strikers had occurred during the strike, but no evidence had been introduced identifying the guilty parties (R. 442).[2] Counsel for petitioner stated the purpose of the line of questioning was twofold: (1) to show that petitioner "had a reasonable basis for believing" that the strikers were guilty of misconduct and that petitioner therefore lawfully denied them reinstatement; and (2) to show that the strikers in fact were the guilty parties and that the Board therefore should apply its usual rule of withholding the reinstatement remedy from employees who are guilty of serious strike misconduct (R. 431).

On objection by the attorney for the General Counsel of the Board, the Trial Examiner precluded petitioner from continuing with this line of questioning

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[2] Commission of these acts was not established by testimony but is in the record as an offer of proof which was rejected upon petitioner's inability to identify by competent evidence the persons responsible for the acts (R. 326-339, 442). A counter-offer of proof was made to establish that the property damage involved was unconnected with the strike (R. 366-367).

(R. 442). In making his ruling, the Trial Examiner, observed that misconduct by strikers was a "line of inquiry" which he "suspected we will go into" (R. 433). However, noting that counsel for petitioner had admitted that he had no knowledge of whether the witness had any relevant information about the matter, and that he had not made any investigation in this respect before calling the witness to the stand, the Trial Examiner concluded: "I think that there are proper ways of proving matters, I don't think this is the way it should be done" (R. 440, 442). No further effort was made by petitioner to adduce evidence that the strikers had committed any misconduct.

The Board "reviewed the rulings of the Trial Examiner made at the hearing," and adopted them (R. 71).

B. The Decision of the Court of Appeals

The court below sustained the Board's findings as supported by substantial evidence, and enforced the Board's order in full. With respect to the matters raised by the instant petition, the court below held that "The Board's decision, including that part adopted from the Trial Examiner's report, sufficiently informed respondent of the disposition of all of its exceptions" (Pet. 9a), and that although "There was evidence of acts of a serious nature during the maintenance of the picket line, * * * there was no proof that any identified striker, or for that matter any unidentified striker, took part in such acts" (Pet. 8a-9a). In addition, the opinion states that "As to the

several other contentions of [petitioner], they have been disposed of by what has heretofore been said or have been considered and found to be without merit" (Pet. 10a).

Following decision of the court below, petitioner filed a petition for rehearing, a petition for rehearing *en banc*, and a motion to reopen the record to adduce additional evidence. An affidavit of employee Frank Neal was attached thereto, alleging that he, Coker, and other strikers had participated in certain acts of misconduct during the strike. The court below thereafter entered two orders. In one, the division of the court which had heard the case (which included a retired member of the court, Judge Huxman) denied the petition for rehearing. In the other, the court, comprised of all its active judges and Judge Huxman, denied the petition for rehearing *en banc*. (Pet. 10a, 11a.)

ARGUMENT

The decision below is correct, it does not conflict with that of any other court of appeals, and no issue warranting review by this Court is presented.

1. Petitioner does not challenge the correctness of the Board's unfair labor practice findings, but merely the propriety of the Trial Examiner's ruling sustaining an objection to the interrogation of strikers as to whether they knew the identity of the persons responsible for certain property damage during the strike (Pet. 15-18), and the Board's adoption of that ruling without further explication (Pet. 18-21). There is no merit to petitioner's contentions.

Contrary to petitioner's view, the evidentiary ruling of which it complains did not "entirely cut off petitioner from establishing a connection between the serious misconduct and the striking employees" (Pet. 16). The basis for the objection to petitioner's line of inquiry was not immateriality—the objecting attorney (and, also, the Trial Examiner) recognized that petitioner might properly attempt by competent evidence to identify strikers as participants in strike misconduct (R. 433, 441)— but, rather, that in the circumstances petitioner had ventured upon nothing more than a random "fishing expedition" (R. 442). The Trial Examiner indicated that petitioner was not precluded from going into this line of inquiry, placing his ruling on the ground that the particular questioning was not "the way it should be done" (R. 442).[3] Accordingly, the only issue is whether this ruling was within the authority of the Trial Exam-

[3] Although the Examiner added that (R. 442) "I think that as the record stands now these matters are immaterial," it is clear from this statement, particularly when read in the light of his preceding remarks—"I think that there are proper ways of proving matters. I don't think this is the way it should be done"—that "immaterial" was used, not in the sense that evidence of misconduct by the strikers was not germane to the issues, but only to indicate that the particular means used to elicit that evidence was improper.

It should be noted, however, that such evidence was material only with respect to one of the two issues on which petitioner sought to adduce it, viz., the appropriateness of reinstatement as a remedy. For evidence of strike misconduct which comes to light for the first time in the hearing obviously can have no bearing on petitioner's motive for refusing to reinstate the strikers at the time of their application (see p. 5, *supra*).

iner to control the manner of proof at the hearing.

Petitioner's concession at the hearing that it had conducted no previous investigation to determine whether the strikers whom it wished to call as witnesses had any relevant information as to the identity of those responsible for the property damage in question (R. 440) justifies the Trial Examiner's ruling. To permit such questioning in these circumstances would allow an attorney to substitute the hearing for an investigation of his case, and to ask random questions of witnesses, where he has no knowledge as to whether they could give any relevant testimony, in the hope that something might turn up that would help his case. See *Storm* v. *United States*, 94 U.S. 76, 84-85. Cf. *National Labor Relations Board* v. *Donnelly Garment Co.*, 330 U.S. 219, 236.

Petitioner's contention that the Board did not "give any reasons why it thought the exception [to the Trial Examiner's evidentiary ruling] should be overruled" (Pet. 19) is on no firmer footing. As shown above, the Trial Examiner gave the basis of his ruling, and the Board, in its decision, stated that it had reviewed the rulings of the Trial Examiner and that such rulings were affirmed. When the Board is satisfied with the Examiner's rulings, it is assuredly free to adopt them. "Further particularity is not required." *National Labor Relations Board* v. *State Center Warehouse Co.*, 193 F. 2d 156, 158 (C.A. 9). See, also, *National Labor Relations Board* v. *Sharples Chemicals, Inc.*, 209 F. 2d 645, 652-653 (C.A. 6), and cases there cited.

2. The refusal of the court below to remand the case to permit petitioner to offer evidence that certain of the strikers participated in misconduct during the strike does not present a question warranting review by this Court.[4] Although petitioner asserted in its motion to remand that the supporting affidavit was initially made available to it following the decision of the court below, petitioner made no showing that it could not have obtained the information contained in the affidavit by a proper investigation of its case in the first instance. Thus, the affidavit shows at most that petitioner might have been able to adduce some evidence favorable to it had it originally prepared and tried its case in accordance with conventional practice. This showing neither impairs the correctness of the Trial Examiner's ruling that petitioner did not follow proper procedure in attempting to put its evidence into the record, nor does it entitle petitioner as of right to another opportunity to retry its case correctly.

The conclusion that the Court of Appeals did not abuse its discretion is supported not only by the circumstance that the normal risk of failing to present evidentiary matters within the framework of the hearing officer's rulings is the exclusion of that part of the case, but also by the fact that more than four

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[4] Petitioner's complaint (Pet. 23) that the motion for a remand was not specifically ruled upon by the court below is groundless. The denial of the two motions for rehearing necessarily constitutes a denial of the motion for a remand as well. See *Southport Petroleum Co.* v. *National Labor Relations Board*, 315 U.S. 100, 104.

years elapsed between the discharges which set off the strike and the production of the affidavit in question. "It is just as important that there should be a place to end as that there should be a place to begin litigation." *Stoll* v. *Gottlieb*, 305 U.S. 165, 172. See also, *Mine, Mill and Smelter Workers* v. *Eagle-Picher Co.*, 325 U.S. 335.

3. Petitioner complains finally (Pet. 13-15) that Judge Huxman, a retired judge of the circuit, participated in the *denial* of petitioner's application for rehearing *en banc*[5]—a denial in which all of the active circuit judges also participated and in which none noted dissent. This, of course, is a quite different situation from that presented in *United States* v. *American-Foreign SS. Corp.*, 363 U.S. 685, in which this Court held that a retired judge might not participate in the ultimate decision of a case in which a rehearing *en banc* had been ordered. This distinction was, indeed, most plainly drawn in the *American-Foreign* case itself, in which the Court stated (p. 688):

> Moreover, there is not involved here any issue as to the procedure to be followed by a Court of Appeals in determining whether a hearing or rehearing *en banc* is to be ordered. In the *Western Pacific Railroad Case*, 345 U. S. 247, it was held that this question is largely to be left to intramural determination by each of the Courts of Appeals. "The court is left free to devise its own administrative machinery to pro-

[5] Petitioner did not advance this contention in the court below.

vide the means whereby a majority may order such a hearing." 345 U. S. at 250.

Here we are concerned only with the specific provision of the Judicial Code which ordains that *en banc* proceedings shall be "heard and *determined*" by a court consisting of all the "*active* circuit judges" of the circuit involved. The literal meaning of the words seems plain enough. An "active" judge is a judge who has not retired "from regular active service." 28 U.S.C. § 371 (b). A case or controversy is "determined" when it is decided. [*]

28 U.S.C. 46(c) provides that a rehearing *en banc* may be ordered "by a majority of the circuit judges of the circuit who are in active service." If in this case a majority of the active circuit judges had voted for rehearing *en banc*, unquestionably it would have been so ordered by the court without regard to any contrary view of Judge Huxman. As a retired judge, his "vote" obviously could not have been counted under the statute in determining whether there was

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[*] In the *American-Foreign* case, the United States advised this Court as follows (Reply Brief, p. 4):

> "* * * there would appear to be no reason why a retired or assigned judge who has sat in the case may not take part in the consideration of a petition for rehearing *en banc* if the court of appeals chooses to allow such a procedure. But it does not follow that a retired or assigned judge may effectively vote to *grant* a rehearing *en banc*. * * * We are aware of no case in which rehearing *en banc* was *granted* on the basis of a vote by any judge who was not a circuit judge of the circuit in active service. * * *" [Italics in original.]

This view, to which we adhere, finds confirmation in the Court's *American-Foreign* opinion, as the excerpt quoted in the text indicates.

a majority of the active judges in favor of granting rehearing *en banc*. And there is not the slightest indication that any such situation arose in the instant case. So far as appears, none of the active circuit judges voted for rehearing. Thus, on the facts here, there is no basis for suggesting either that 28 U.S.C. 46 (c) has been violated or that petitioner has suffered any prejudice as a result of Judge Huxman's participation in the court's deliberations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITIONER'S REPLY

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PETITIONER'S REPLY

The Board's Brief in Opposition is a bundle of distortions and omissions. These, however, cannot obscure the important questions presented by the Petition.

I

The Brief in Opposition notably misdescribes the events whereby the trial examiner shut petitioner off from adducing evidence as to a connection between serious misconduct and striking employees.

The Board's Brief in Opposition (page 6) states, and quite incorrectly:

> "However, noting that counsel for petitioner had admitted that he had no knowledge of whether the witness had any relevant information about the matter, and that he had not made any investigation in this respect before calling the witness to the stand, the Trial Examiner concluded: 'I think that there are proper ways of proving matters. I don't think this is the way it should be done' (R. 440, 442)."

Neither the trial examiner nor the Board nor the Board's attorneys have ever suggested what could have been a more "proper way" of proving these matters than by doing what petitioner did here—namely, calling as witnesses to testify under oath the striking employees themselves, who were the very persons possessing the most direct information concerning the important matters being inquired into. Indeed, the record makes it clear that calling the strikers to testify was the only practical way of getting direct evidence on the existence of any connection between the strikers and the serious acts of misconduct stealthily committed.

In any event, examination of the record will show that, contrary to what the Board's Brief in Opposition asserts, petitioner's counsel did not "admit"—nor did the trial examiner "note" any such non-existent admission—that petitioner's counsel "had no knowledge of whether the witness had any relevant information about the matter". In fact, petitioner's counsel furnished the trial examiner with a number of eminently sensible reasons why petitioner's counsel thought the witness McOsker probably did have relevant information about the matter—such as McOsker's presence in the critical area for extensive periods of time, and McOsker's role as an energetic picketer (R. 438, 439,

440). Moreover, even if (contrary to actual fact) petitioner's counsel had made any such admission and even if (contrary to actual fact) the trial examiner had relied on it, this would not have furnished the slightest justification for the trial examiner's denial of fair hearing on this fundamental issue. However erroneous and unintelligible the trial examiner's ruling may have been, it is clear that, as the Board's Brief in Opposition (page 8) is now compelled to acknowledge, the trial examiner did rule the entire line of inquiry to be "immaterial".

The Board's Brief in Opposition (page 6) next states: "No further effort was made by petitioner to adduce evidence that the strikers had committed any misconduct". This gives the wholly incorrect impression that petitioner made no effort whatsoever—except through the single witness McOsker—to prove a connection between the strikers and the serious acts of misconduct. But the record shows that immediately after the trial examiner ended the long colloquy by announcing a definitive ruling which prevented this entire line of inquiry from being put to the witness McOsker (R. 442), the following occurred (R. 443; and see Petition, page 9):

> "Mr. Moyer [petitioner's counsel]: In the courtroom, Mr. Examiner, I don't know, six or seven other persons who have been called in a manner similar to Mr. McOsker and they want to leave. I have paid them their witness fees and I think if they want to leave, why, I, of course, have no further reason to call those people.
>
> "Trial Examiner: Well, for your record, Mr. Moyer, let's say this, that the Examiner's ruling would be the same in the event that the respondent called K. Darrel Cole, Leeland D. Daley, Joseph J.

> Goulart, Marlow D. Hippen, Marilyn G. Menefee, Edward L. Millar, L. V. Parsons,[1] who are the persons whom I know the respondent has served.
>
> "Mr. Moyer: Very well, sir, and then in order to abide by that ruling I shall release those witnesses from the subpoena."

Thus, the record fully shows petitioner's extensive effort to be allowed to adduce, from this large group of competent witnesses, testimony which would establish whether there was a connection between the strikers and the serious acts of misconduct. The trial examiner would not allow a single question along these lines to be asked of any of them.

The Board's Brief in Opposition (page 9) finally observes on this matter:

> "Petitioner's concession at the hearing that it had conducted no previous investigation to determine whether the strikers whom it wished to call as witnesses had any relevant information as to the identity of those responsible for the property damage in question (R. 440) justifies the Trial Examiner's ruling."

What the record actually shows on this point at R. 440 is the following:

> "Trial Examiner: I am interested in that you have made no comment as yet that indicates that there has been any personal contact or interview with Mr. McOsker which leads you to believe that he could give you information.
>
> "Mr. Moyer [petitioner's counsel]: I will say this, Mr. Examiner, that so far as I am concerned,

[1] As stated in the Petition (page 7, note 4), all seven of these individuals, as well as McOsker, were striking employees included in the Board's reinstatement order (R. 83).

> the respondent's counsel, Mr. Cranmer,[2] is his attorney. Under the rules of practice and ethics in the State of Kansas, a lawyer is prohibited from talking to the client of another attorney. . . . And I have so conducted this entire case. I have never talked on matters pertaining to the case to any of the picketers, either on the picket line or after or during or anything, for that reason."

If petitioner had sought to interrogate these strikers prior to the Board hearing, it may safely be surmised not only that this would have been impossible, but also that the Board itself would have been the first to complain. In any event, the most appropriate place for petitioner to interrogate the striking employees as to their connection with the serious acts of misconduct was when they were witnesses under oath at the hearing. They were the proper people to interrogate in order to get direct evidence on the matter; and petitioner took every reasonable step to do so. Despite petitioner's vigorous efforts the trial examiner, sustaining objections by the Board's trial attorney, completely shut petitioner off from doing so. The record does not offer even the flimsiest justification for this denial of a fair hearing.

II

The Board's Brief in Opposition (page 6) asserts: "The Board 'reviewed the rulings of the Trial Examiner made at the hearing,' and adopted them (R. 71)."

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[2] Mr. Cranmer appeared in the proceeding on behalf of the complaining union (R. 84). Also, as attorney for the individuals who went on strike (including the eight whose testimony the trial examiner prevented petitioner from adducing at this hearing), Mr. Cranmer had written the letter demanding reinstatement of the striking employees (R. 33).

Actually, however, the Board's decision states not that the Board "adopted" the trial examiner's rulings, but rather that the Board "finds no prejudicial error was committed" (R. 71). The Brief in Opposition (page 9) further asserts: "As shown above, the Trial Examiner gave the basis of his ruling, and the Board, in its decision, stated that it had reviewed the rulings of the Trial Examiner and that such rulings were affirmed". But as just indicated, nowhere in its decision did the Board state "that such rulings were affirmed".

Thus the whole premise is missing from the Brief in Opposition's contention (page 9) that, "When the Board is satisfied with the Examiner's rulings, it is assuredly free to adopt them", and that "further particularity is not required".

In any event it would be difficult to find a case calling more strongly for faithful adherence to the Administrative Procedure Act's requirement for particularity. The trial examiner here made an utterly unintelligible ruling that a whole line of inquiry, clearly fundamental to the reinstatement issues in the case, was "immaterial"; the trial examiner prevented petitioner from adducing essential evidence from competent available witnesses possessing direct knowledge as to the facts. Despite petitioner's exception setting forth the deprivation of fair hearing and due process, the Board's decision totally ignored the question, and gave no ground of decision. Indeed, if some ground was even thought by the Board to exist, the Board left it wholly unarticulated. The Board did not approve or adopt the trial examiner's ground; nor did the Board make the

slightest effort to comply with the requirements of Section 8(b) of the Administrative Procedure Act.

While asserting (page 7) that the Tenth Circuit's decision in this case "does not conflict with that of any other court of appeals," the Brief in Opposition carefully avoids mentioning—and makes no effort to distinguish—the decisions (Petition, pages 20-21) which show conflict with the Third, Fourth, Eighth and District of Columbia Circuits. As the Petition makes clear, the Board's order in the present case would not have been enforced in those circuits because the Board so plainly failed to comply with the minimum standards of articulateness which those Courts of Appeals have correctly held Section 8(b) imposes on administrative agencies.

III

In seeking to answer petitioner's contention that the Court of Appeals should have remanded the case to the Board for taking new evidence, the Brief in Opposition (page 10) once again rests upon a fallacious assertion of "the correctness of the Trial Examiner's ruling that petitioner did not follow proper procedure in attempting to put its evidence into the record".

Moreover, the Brief in Opposition (page 10, note 4) erroneously suggests *Southport Petroleum Co.* v. *National Labor Relations Board*, 315 U.S. 100, 104, as authority to refute petitioner's complaint that here the motion for remand was not expressly ruled on by the Court of Appeals. The citation is wholly wide of the mark. In *Southport Petroleum*, the Court of Appeals had expressly considered the motion for leave to adduce additional evidence and had expressly decided that the

additional evidence proffered would be immaterial.' This contrasts sharply with the Court of Appeals' failure here.

IV

With respect to petitioner's first question presented—that the Court of Appeals here constituted itself illegally for passing upon the petition for rehearing *en banc*—the Brief in Opposition (page 11, note 5) complains: "Petitioner did not advance this contention in the court below". However, until June 1, 1960, when the Tenth Circuit handed down its orders denying petition for rehearing and denying petition for rehearing *en banc* (Petition, page 10a), it was not evident how the Court of Appeals would constitute itself to pass upon the petition for rehearing *en banc*, or that the Court of Appeals would do so by including a retired judge along with the five active judges in a manner contrary to what the statute contemplates. Indeed, the Tenth Circuit's Rules contain a provision in Rule 20 ("Oral Arguments"), paragraph 7, which would have looked like an outright prohibition against the

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[3] See *National Labor Relations Board* v. *Southport P. Co.*, 117 F. 2d 90, 92 (5th Cir. 1941), where the Court of Appeals had stated:

> "Respondent has filed in this Court an application for leave to adduce additional evidence to the effect that, subsequent to the entry of the order by the Board, it disposed of all its assets, and was dissolved. Respondent is a Texas corporation. Under the laws of that state the corporation, upon dissolution, is continued in existence for a period of three years for the purpose of suing and being sued. Conceding that the dissolution has taken place, it can have no effect upon this proceeding."

This Court in affirming agreed that the proffered evidence was immaterial. Here the proffered evidence was clearly material (Petition, pages 22-23).

illegal practice which was followed in the present case;[4] and the Court of Appeals' unjustified departure from its own Rule is a further ground for the exercise of this Court's supervisory power. In any event, the orders issued June 1, 1960, showed the Court of Appeals was finished with the case; the rules of the Court of Appeals do not contemplate successive petitions for rehearing; and this Court became the proper place for petitioner to raise the question.

The Board's Brief in Opposition (page 12) also asserts that retired Judge Huxman's vote "obviously could not have been counted." The Board presumably has no more knowledge as to this matter than does petitioner—which is none at all. The Court of Appeals should not have constituted itself illegally; and since it did so, its order should be vacated.

The Brief in Opposition (page 12, note 6) seeks to avert this consequence by offering a fine-spun distinction excerpted from the brief which the Government filed in *United States* v. *American-Foreign SS. Corp.*, 363 U.S. 685. But this Court's decision in *American-Foreign* in no way endorsed the far-fetched reasoning in that excerpt. The *American-Foreign* opinion does not give the slightest intimation that the statute could fairly support such an exceptionally attenuated distinction. Moreover, the Government's assertion that

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[4] The text of Rule 20, paragraph 7, reads as follows [emphasis added]:

"7. A hearing of a case or controversy shall be had before the Court en banc only when ordered by a majority of the Judges of the Circuit who are in active service. *Applications for hearing en banc will be considered by all the Judges of the Circuit who are in active service.* A majority of such Judges may order a hearing en banc sua sponte. *This rule shall also apply to rehearings en banc.*"

any such distinction could be squared with the *American-Foreign* decision is, by itself, an additional factor which will generate needless confusion unless this Court promptly sets it at rest.

CONCLUSION

For the reasons set forth in the Petition and in this Reply, certiorari should be granted.

Respectfully submitted,

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